

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

JANA NOEL BRISBOIS,

Plaintiff,

vs.

No. CIV 24-0062 JB/KK

LEE DUDEK, Acting Commissioner  
of the Social Security Administration,

Defendant.

**MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S  
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

**THIS MATTER** comes before the Court on the United States Magistrate's Proposed Findings and Recommended Disposition, filed February 19, 2025 (Doc. 27)(“PFRD”). In the PFRD, the Honorable Kirtan Khalsa, United States Magistrate Judge for the United States District Court for the District of New Mexico, recommends that the Court grant Plaintiff Jana Noel Brisbois' requests her in her Motion to Award Immediate Payment of Benefits or Reverse and Remand for Rehearing with Supporting Memorandum, filed June 14, 2024 (Doc. 18), and grant in part and deny in part Defendant Commissioner of Social Security's Opposed Motion to Remand for Further Administrative Proceedings Pursuant to Sentence Four of 42 U.S.C. § 405(g), filed September 5, 2024 (Doc. 23). The PFRD notifies the parties of their ability to file objections within fourteen days and that the failure to file objections waives appellate review. See Doc. 18 at 21-22. The parties had until March 5, 2025, to file any objections to the PFRD. See Doc. 18 at 21-22. The parties have not filed any objections.

**LAW REGARDING OBJECTIONS TO PROPOSED FINDINGS AND**

## **RECOMMENDATIONS**

District courts may refer dispositive motions to a Magistrate Judge for a recommended disposition. See Fed. R. Civ. P. 72(b)(1) (“A magistrate judge must promptly conduct the required proceedings when assigned, without the parties’ consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement.”). Rule 72(b)(2) of the Federal Rules of Civil Procedure governs objections: “Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.” Fed. R. Civ. P. 72(b)(2). When resolving objections to a Magistrate Judge’s proposal, “[t]he district judge must determine de novo any part of the Magistrate Judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3).

Similarly, 28 U.S.C. § 636 provides:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

“The filing of objections to a magistrate’s report enables the district judge to focus attention on those issues -- factual and legal -- that are at the heart of the parties’ dispute.” United States v. One Parcel of Real Property, With Buildings, Appurtenances, Improvements, & Contents, Known As: 2121 East 30th Street, Tulsa Okla., 73 F.3d 1057, 1059 (10th Cir. 1996) (“One Parcel”) (quoting Thomas v. Arn, 474 U.S. 140, 147 (1985)). The United States Court of Appeals for the Tenth Circuit notes: “[T]he filing of objections advances the interests that underlie the Magistrate’s

Act,<sup>[1]</sup> including judicial efficiency.” One Parcel, 73 F.3d at 1059.

The Tenth Circuit has held “that a party’s objections to the magistrate judge’s report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.” One Parcel, 73 F.3d at 1060. “To further advance the policies behind the Magistrate’s Act, [the Tenth Circuit], like numerous other circuits, ha[s] adopted ‘a firm waiver rule’ that ‘provides that the failure to make timely objections to the magistrate’s findings or recommendations waives appellate review of both factual and legal questions.’” One Parcel, 73 F.3d at 1059 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)). “[O]nly an objection that is sufficiently specific to focus the district court’s attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate’s Act.” One Parcel, 73 F.3d at 1060.

In addition to requiring specificity in objections, the Tenth Circuit states that “[i]ssues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.” Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996). See United States v. Garfinkle, 261 F.3d 1030, 1031 (10th Cir. 2001)(“In this circuit, theories raised for the first time in objections to the magistrate judge’s report are deemed waived.”). Likewise, in an unpublished opinion, the Tenth Circuit states that “the district court correctly held that [a petitioner] had waived argument by failing to raise it before the magistrate.” Pevehouse v. Scibana, 229 F. App’x 795, 796 (10th Cir. 2007)(unpublished).<sup>2</sup>

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<sup>1</sup>Congress enacted the Federal Magistrates Act, 28 U.S.C. §§ 631-39, in 1968.

<sup>2</sup>Pevehouse v. Scibana is an unpublished opinion, but the Court can rely on an unpublished Tenth Circuit opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A) (“Unpublished decisions are not precedential, but may be cited for their persuasive value.”). The Tenth Circuit has stated:

In this circuit, unpublished orders are not binding precedent, ... and we have

The Tenth Circuit notes, “however, that ‘[t]he waiver rule as a procedural bar need not be applied when the interests of justice so dictate.’” One Parcel, 73 F.3d at 1060 (quoting Moore, 950 F.2d at 659 (“We join those circuits that have declined to apply the waiver rule to a pro se litigant’s failure to object when the magistrate’s order does not apprise the pro se litigant of the consequences of a failure to object to findings and recommendations.”)). In One Parcel, the Tenth Circuit notes that the district judge decided sua sponte to conduct a de novo review despite the objections’ lack of specificity, but the Tenth Circuit held that it would deem the issues waived on appeal, because to find waiver would advance the interests underlying the waiver rule. See 73 F.3d at 1060-61 (citing cases where district courts elect to address merits despite potential application of waiver rule, but appellate courts opt to enforce waiver rule).

When a party files timely and specific objections to the Magistrate Judge’s PFRD “on . . . dispositive motions, the statute calls for a de novo determination, not a de novo hearing.” United States v. Raddatz, 447 U.S. 667, 674 (1980). The Tenth Circuit states that a de novo determination pursuant to 28 U.S.C. § 636(b) “requires the district court to consider relevant evidence of record and not merely review the magistrate judge’s recommendation.” In re Griego, 64 F.3d 580, 584 (10th Cir. 1995). The Supreme Court of the United States notes that, although a district court must make a de novo determination of the objections to recommendations under 28 U.S.C. § 636(b)(1), the district court is not precluded from relying on the Magistrate Judge’s PFRD. See United States v. Raddatz, 447 U.S. at 676 (“[I]n providing for a ‘de novo determination’ rather than de novo

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generally determined that citation to unpublished opinions is not favored. However, if an unpublished opinion or order and judgment has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005) (citing In re Citation of Unpublished Opinions/Orders & Judgments, 151 F.R.D. 470 (10th Cir. 1993)). The Court concludes that Pevehouse v. Scibana has persuasive value with respect to a material issue and will assist the Court in its disposition of the matters now before it.

hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.”)(quoting 28 U.S.C. § 636(b)(1)); Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla., 8 F.3d 722, 724-25 (10th Cir. 1993)(holding that district court's adoption of magistrate judge's “particular reasonable-hour estimates” was consistent with a de novo determination, because “the district court ‘may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate,’ . . . [as] ‘Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate [judge]’s proposed findings and recommendations.”)(quoting 28 U.S.C. § 636(b)(1)) (emphasis in Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla.).

“[T]he district court is presumed to know that de novo review is required. Consequently, a brief order expressly stating the court conducted de novo review is sufficient.” Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996). “[E]xpress references to de novo review in [the district court's] order must be taken to mean it properly considered the pertinent portions of the record, absent some clear indication otherwise.” Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla., 8 F.3d at 724. The Tenth Circuit holds that a district court properly conducts a de novo review of a party's evidentiary objections when the district court's “terse” order contains one sentence on each of the party's “substantive claims” and does “not mention his procedural challenges to the jurisdiction of the magistrate to hear the motion.” Garcia v. City of Albuquerque, 232 F.3d 760, 766 (10th Cir. 2000). As the Tenth Circuit explains, brief orders that “merely repeat[] the language of § 636(b)(1) to indicate its compliance” are sufficient to demonstrate that the district court conducted a de novo review:

It is common practice among district judges in this circuit to make such a statement and adopt the magistrate judges' recommended dispositions when they find that magistrate judges have dealt with the issues fully and accurately and that they could

add little of value to that analysis. We cannot interpret the district court's statement as establishing that it failed to perform the required de novo review.

In re Griego, 64 F.3d at 584.

Where no party objects to the Magistrate Judge's PFRD, the Court has, as a matter of course in the past and in the interests of justice, reviewed the Magistrate Judge's recommendations. In Workheiser v. City of Clovis, No. CIV 12-0485 JB/GBW, 2012 WL 6846401 (D.N.M. Dec. 28, 2012)(Browning, J.), where the plaintiff fails to respond to the Magistrate Judge's PFRD, although the Court determines that the plaintiff "has waived his opportunity for the Court to conduct review of the factual and legal findings in the PFRD," the Court nevertheless conducts such a review. 2012 WL 6846401, at \*3. The Court generally does not review, however, the Magistrate Judge's PFRD de novo and determine independently necessarily what it would do if the issues had come before the Court first, but rather adopts the PFRD where "[t]he Court cannot say that the Magistrate Judge's recommendation . . . is clearly erroneous, arbitrary, [obviously]<sup>3</sup> contrary to law, or an

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<sup>3</sup>The Court previously used as the standard for review when a party does not object to the Magistrate Judge's PFRD whether the recommendation is "clearly erroneous, arbitrary, contrary to law, or an abuse of discretion," thus omitting "obviously" in front of contrary to law. Solomon v. Holder, No. CIV 12-1039 JB/LAM, 2013 WL 499300, at \*4 (D.N.M. Jan. 31, 2013)(Browning, J.)(adopting the recommendation to which there is no objection, stating: "The Court determines that the PFRD is not clearly erroneous, arbitrary, contrary to law, or an abuse of discretion, and accordingly adopts the recommendations therein."); O'Neill v. Jaramillo, No. CIV 11-0858 JB/GBW, 2013 WL 499521 (D.N.M. Jan. 31, 2013)(Browning, J.)(“Having reviewed the PRFD under that standard, the Court cannot say that the Magistrate Judge's recommendation is clearly erroneous, arbitrary, contrary to law, or an abuse of discretion. The Court thus adopts Judge Wormuth's PFRD.”)(citing Workheiser v. City of Clovis, 2012 WL 6846401, at \*3); Galloway v. JP Morgan Chase & Co., No. CIV 12-0625 JB/RHS, 2013 WL 503744 (D.N.M. Jan. 31, 2013)(Browning, J.)(adopting the Magistrate Judge's recommendations upon determining that they are not "clearly contrary to law, or an abuse of discretion."). The Court concludes that "contrary to law" does not accurately reflect the deferential standard of review that the Court intends to use when there is no objection. Finding that a Magistrate Judge's recommendation is contrary to law requires the Court to analyze the Magistrate Judge's application of law to the facts or the Magistrate Judge's delineation of the facts -- in other words performing a de novo review, which is required when a party objects to the recommendations only. The Court contends that

abuse of discretion.” Workheiser v. City of Clovis, 2012 WL 6846401, at \*3. This review, which is deferential to the Magistrate Judge’s work when there is no objection, nonetheless provides some review in the interest of justice, and seems more consistent with the intent of the waiver rule than no review at all or a full-fledged review. Accordingly, the Court considers this standard of review appropriate. See Thomas v. Arn, 474 U.S. at 151 (“There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate’s report than the court considers appropriate.”). The Court is reluctant to have no review at all if its name is going at the bottom of the order adopting the Magistrate Judge’s PFRD.

### **ANALYSIS**

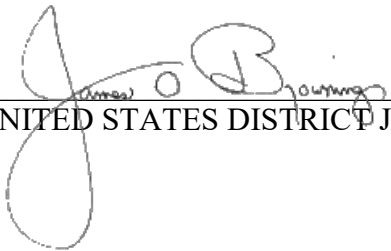
The Court carefully has reviewed the PFRD and the relevant pleadings. The Court does not review the PFRD de novo, because the parties have not objected to the PFRD, but rather the Court reviews Magistrate Judge Khalsa’s PFRD to determine if it is clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion. The Court determines that the PFRD is not clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion. Accordingly, the Court will adopt the PFRD.

**IT IS ORDERED** that: (i) the Magistrate Judge’s Proposed Findings and Recommended Disposition, filed February 19, 2025 (Doc. 27), is adopted; (ii) the requests in the Claimant’s Motion to Award Immediate Payment of Benefits or Reverse and Remand for Rehearing with Supporting Memorandum, filed June 14, 2024 (Doc. 18), are granted with respect to her request seeking remand for an immediate award of benefits; (iii) the Defendant’s Opposed Motion to

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adding “obviously” better reflects that the Court is not performing a de novo review of the Magistrate Judges’ recommendations. Going forward, therefore, the Court will, as it has done for some time now, review the Magistrate Judges’ recommendations to which there are no objections for whether the recommendations are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion.

Remand for Further Administrative Proceedings Pursuant to Sentence Four of 42 U.S.C. § 405(g), filed September 5, 2024 (Doc. 23)(“Defendant’s Motion”), is granted in part with respect to his request to reverse and remand Administrative Law Judge (“ALJ”) Fellabaum’s decision; (iv) the Defendant’s Motion is denied with respect to his request to remand for additional administrative proceedings; and (v) the ALJ’s decision is reversed, and this matter is remanded for an immediate award of Supplemental Security Income benefits for Claimant’s period of demonstrated disability from August 6, 2015 through January 9, 2020.



UNITED STATES DISTRICT JUDGE

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